INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	4
Reasons for granting the writ	8
Conclusion	12
Appendix	13

CITATIONS

Cases:

Accardi v. *Pennsylvania Railroad Company*, 341 F. 2d 72	7, 9
Accardi v. *Pennsylvania R. Co.*, 383 U.S. 225	7, 8, 9, 12
Inland Steel Co. v. *N.L.R.B.*, 170 F. 2d 247, certiorari denied, 336 U.S. 960	11
MacLaughlin v. *Union Switch & Signal Company*, 166 F. 2d 46	10
Mentzel v. *Diamond*, 167 F. 2d 299	10
National Labor Relations Board v. *Bemis Bro. Bag Co.*, 206 F. 2d 33	11
National Labor Relations Board v. *Black-Clawson Co.*, 210 F. 2d 523	11
National Labor Relations Board v. *Central Illinois Public Service Co.*, 324 F. 2d 916	11
National Labor Relations Board v. *Century Cement Mfg. Co.*, 208 F. 2d 84	11
National Labor Relations Board v. *Citizens Hotel Company*, 326 F. 2d 501	11
National Labor Relations Board v. *United Brass Works, Inc.*, 287 F. 2d 689	11
Retail Clerks Union, No. 1550 v. *N.L.R.B.*, 330 F. 2d 210, certiorari denied, 379 U.S. 828	11
Richfield Oil Corporation v. *N.L.R.B.*, 231 F. 2d 717, certiorari denied, 351 U.S. 909	11
W. W. Cross & Co. v. *N.L.R.B.*, 174 F. 2d 875	11

276-063—67——1

Statutes:

Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U.S.C. App. (1946 ed.) 308: Page
Section 8 8

Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459:
Section 9 ..... 2, 7, 8
Section 9(a) 2
Section 9(b) 3, 6
Section 9(c) 4, 6, 7, 9
Section 9(d) 4

Miscellaneous:

Forkosch, *A Treatise on Labor Law*, § 557, pp. 854-866 (2d ed., 1965) 11
Note, *Proper Subjects for Collective Bargaining: Ad Hoc v. Predictive Definition*, 68 Yale L.J. 303 (1959) 11
Rolfe, *Fringe Benefits Today and Tomorrow*, 7 Labor L.J. 476 (August 1956) 11

In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

STEPHEN R. EAGAR, ET AL., PETITIONERS

v.

MAGMA COPPER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Stephen R. Eagar, Ray F. Stephens, James V. Mork, and Levi D. Jaramillo,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 31, 1967.

OPINIONS BELOW

Neither the initial opinion of the court of appeals (App., *infra*, pp. 13–17) nor its opinion denying rehearing (App., *infra*, pp. 18–20) is yet reported. The district court rendered no opinion.

[1] The Department of Justice represents these veterans pursuant to Section 9(d) of the Universal Military Training and Service Act, 50 U.S.C. App. 459(d).

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1966, and a timely petition for rehearing was denied on May 31, 1967 (App., *infra*, p. 18). On August 28, 1967, Mr. Justice Fortas extended the time within which to file a petition for a writ of certiorari to and including September 29, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

An individual who was continuously employed by respondent, Magma Copper Company, for one year and worked 75 percent of the available shifts that year is entitled to a paid vacation if he is in respondent's employ at the end of that period. Respondent's employees are also entitled to certain paid holidays if they have been continuously employed by respondent for three months prior to the holiday. The question presented is whether, by virtue of Section 9 of the Universal Military Training and Service Act (50 U.S.C. App. 459), an individual who would be eligible for paid vacations and holidays but for the fact that his employment was interrupted by military service is entitled to them.

STATUTE INVOLVED

The pertinent provisions of Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as amended, 50 U.S.C. App. 459) are as follows:

> (a) Any person inducted into the armed forces under this title * * * for training and service, who, in the judgment of those in author-

ity over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within 90 days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than 1 year—

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so * * *.

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner so as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

STATEMENT

Petitioners are four employees of respondent, Magma Copper Company. Under its collective bargaining agreement with petitioners' union, respondent's employees are entitled to paid vacations and holidays

on the following conditions:[1] Employees who have worked at least 75 percent of the shifts available for a year are entitled to a paid vacation at the year's end, provided that they are in respondent's employ on the day the vacation is to commence, and that "[a]ny employee leaving the service of the Company for any reason (except lay off due to reduction of work force) before his annual determinative date shall not be entitled to a vacation or vacation pay in lieu thereof." (App., *infra*, p. 14.) In order to receive a paid holiday, the agreement provides, a person must be continuously employed by respondent for three months prior to the holiday.

Petitioners' employment with the Magma Copper Company was interrupted by tours of military service. At issue is their right to vacation and holiday pay under the provisions described above unaffected by that interruption. Since the contentions of the four petitioners are identical, we confine discussion to petitioner Eagar, whom the court of appeals described as "fairly representative" of the other claimants (App., *infra*, p. 14).

Eagar entered respondent's employ on March 12, 1958. On March 6, 1959, just short of a year later, he left to enter the Armed Forces. Honorably discharged on April 17, 1962, he returned to his former position with respondent on May 2, 1962. Although Eagar was conceded to have worked more than 75 percent of the shifts available on his vacation-earn-

[1] The pertinent provisions of the relevant collective bargaining agreements are set out in the opinion of the court of appeals, App., *infra*, pp. 13–14.

ing year when he left for military duty on March 6, 1959, respondent refused him any paid vacation for that year because he was not in the company's employ on March 12, 1959, the anniversary date of his employment. In addition, respondent declined to pay Eagar for the Memorial Day and Independence Day holidays which followed his re-employment on May 2, on the ground that he had not been continuously employed for the requisite three month period prior to each of those holidays.

Petitioners contended that the Universal Military Training and Service Act entitled them to be treated as having been continuously employed for purposes of computing their rights to holiday and vacation pay. When respondent declined to honor their claims, they instituted this action in the district court. On the basis of the stipulated facts, that court awarded summary judgment to petitioners on October 5, 1964, and respondent appealed.

The court of appeals reversed. In an opinion rendered on January 31, 1966, it recognized as "well established" that Section 9(b)(B)(i) of the Universal Military Training and Service Act (50 U.S.C. App. 459(b)(B)(i)), which requires a returning veteran to be restored to a position of "like seniority, status, and pay" in his civilian employment, entitles the returning veteran, "without loss of seniority", to those benefits which automatically accrue from length of employment. However, the court concluded that vacation and holiday benefits were not perquisites of seniority but merely "fringe benefits," and, as such, governed by another clause of the Act—Section 9(c)(1)

(50 U.S.C. App. 459(c)(1)), relating to "insurance or other benefits". That section provides that a veteran restored to his former position:

> * * * [S]hall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces * * *.

Since time spent on furlough or leave of absence was not counted by respondent in determining an employee's right to vacation and holiday pay, the Ninth Circuit reasoned that military service time was also excluded.

Petitioners sought rehearing on the basis of this Court's grant of certiorari to review *Accardi* v. *Pennsylvania Railroad Company;* 341 F. 2d 72 (C.A. 2). In that case, dealing with re-employed veterans' rights to severance pay, the Second Circuit read the predecessor provision to Section 9 of the Act in the same manner as the court below in this case. On February 28, 1966, this Court unanimously reversed the decision of the Second Circuit, rejecting, *inter alia,* the distinction which that court had drawn on the basis of the "insurance or other benefits" clause of the Act between rights of seniority and fringe benefits. *Accardi* v. *Pennsylvania R. Co.,* 383 U.S. 225, 231–232.

On May 31, 1967, the Ninth Circuit denied the petition for rehearing by a divided vote. The majority ruled that this Court's decision in *Accardi* had no bearing on the instant case because in that case the "Court did not have before it a 'fringe benefit' type of claim such as those involved in this case * * *"

(App., *infra*, p. 18). Judge Madden dissented on the ground that the majority decision was contrary to *Accardi*, noting that the paid vacations and holidays claimed by petitioners in this case "would have automatically accrued to them had they remained in private employment" instead of entering military service and that this had been the test employed by the Court in *Accardi* to determine whether veterans are entitled to benefits under Section 9 of the Act (App., *infra*, pp. 19–20).

REASONS FOR GRANTING THE WRIT

The ruling of the court of appeals in this case is directly contrary to this Court's decision last Term in *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, and is in conflict with the decisions of another circuit. If left undisturbed, it will deprive veterans restored to their former civilian jobs of substantial benefits that Congress intended Section 9 of the Universal Military Training and Service Act to guarantee them. Review by this Court is plainly warranted.

1. *Accardi* involved the right of re-employed veterans, under what is now Section 9 of the Act,[2] to be treated as though continuously employed in their civilian jobs during their time in military service for purposes of determining the amount of certain separation allowances. In precisely the same manner as in the

[2] Petitioners in *Accardi* were veterans of World War II. As such, their rights in civilian employment were governed by Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U.S.C. App. (1946 ed.) 308. As the Court noted (383 U.S. at 226, n. 1), Section 8 of the 1940 Act was re-enacted as Section 9 of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, the provision applicable here.

case at bar, the Second Circuit in *Accardi* had read the statute as distinguishing between rights flowing from "seniority" and mere "fringe benefits." 341 F. 2d 72, 74. With regard to "seniority" rights, the Second Circuit held that veterans were entitled to be treated as if they had never interrupted their civilian employment. But "fringe benefits," that court held, were governed by the clause of the Act dealing with "insurance or other benefits" (now Section 9(c)(i)), which, in the court's view, placed the returning veteran in no better position than an employee furloughed or on leave of absence for non-military reasons.

This Court reversed the Second Circuit's decision in *Accardi*, holding that Congress intended the Act "to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country," without regard to the "label" which might be placed upon a particular employment benefit. 338 U.S. at 229–230. The Court expressly rejected the interpretation given the "insurance or other benefits" clause by the Second Circuit, holding that this provision had not been intended to qualify the rights guaranteed a returning veteran by other provisions of the Act. It "was intended to add certain protections to the veteran and not take away those which are granted him by [9(b)(B)]" (383 U.S. at 232).

The Ninth Circuit's decision in the instant case cannot be reconciled with *Accardi*. In this case, as in

that one, it was not disputed that the benefits claimed by the re-employed veterans would have accrued to them automatically had they remained in civilian employment instead of entering the Armed Forces. This Court has made clear that all such benefits, whether or not denominated "fringe benefits", accrue to the returning veteran without loss of seniority.

The decision below is also in direct conflict with decisions of the Third Circuit. On two occasions that circuit has squarely held the Act in suit to "embrace vacation rights which the employee has earned and would have received as a matter of course but for his induction." *Mentzel* v. *Diamond*, 167 F. 2d 299, 301; *MacLaughlin* v. *Union Switch & Signal Company*, 166 F. 2d 46, 48.[4]

2. The decision below, if allowed to stand, will cause a widespread problem in the application of the re-employment provisions of the Universal Military Training and Service Act, embracing as they do a vast number of employees—those who have served, and who are continuing to be called for service, in the Armed Forces.[5] Moreover, "fringe benefits" in collec-

[4] Vacations may also form a part of an employee's compensation in that they may have to be earned by a given period of actual work. In that sense, they are not based on "seniority", *i.e.*, length of service alone. However, in this case it is not disputed that petitioners worked the requisite percentage of shifts to be entitled to vacation pay. That pay was denied them because they left respondent's employ, not because it was unearned.

[5] Even limited to vacations, this case has a significant impact. We are informed by the Department of Labor, which administers the provisions in suit, that more than seventy vacation and holiday pay claims have been filed in that Department since the Ninth Circuit's decision in this case. In addition, the Department advises that at least three fourths of the col-

tive bargaining agreements are not limited, as the court of appeals suggested (App., *infra*, p. 16), to "a fairly narrow group of economic advantages." In an era when wages are generally high and income taxes steep, labor and management recognize that it is in the interest of employees to take a large part of their compensation in indirect forms. Unions bargain vigorously for a host of diverse benefits besides wages and the "traditional" rights of seniority.[6] To describe these extensive and valuable additional benefits as "fringe" items is a mere play on words; they are in-

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lective bargaining agreements involving major employers throughout the country contain vacation provisions contingent upon length of service with the employer. Consequently, the instant decision will necessarily affect the vacation rights of most returning veterans.

[6] Such as pensions and retirement plans (*Retail Clerks Union, No. 1550*, v. *N.L.R.B.*, 330 F. 2d 210 (C.A.D.C.), certiorari denied, 379 U.S. 828; *Inland Steel Co.* v. *N.L.R.B.*, 170 F. 2d 247 (C.A. 7), certiorari denied, 336 U.S. 960); profit sharing (*National Labor Relations Board* v. *Black-Clawson Co.*, 210 F. 2d 523 (C.A. 6); bonuses (*National Labor Relations Board* v. *Citizens Hotel Company*, 326 F. 2d 501 (C.A. 5); merit pay (*National Labor Relations Board* v. *United Brass Works, Inc.*, 287 F. 2d 689 (C.A. 4)); company-furnished housing (*National Labor Relations Board* v. *Bemis Bro. Bag Co.*, 206 F. 2d 33 (C.A. 5)); stock purchase plans, (*Richfield Oil Corporation* v. *National Labor Relations Board*, 231 F. 2d 717 (C.A.D.C.), certiorari denied, 351 U.S. 909); vacations (*National Labor Relations Board* v. *Century Cement Mfg. Co.*, 208 F. 2d 84 (C.A. 2)); group health insurance (*W. W. Cross & Co.* v. *N.L.R.B.*, 174 F. 2d 875 (C.A. 1)); and even discounts on gas used for house heating purposes (*National Labor Relations Board* v. *Central Illinois Public Service Co.*, 324 F. 2d 916 (C.A. 7)). See, also, Forkosch, *A Treatise on Labor Law* (2d ed., 1965), § 557, pp. 854–866; Ross, *Fringe Benefits Today and Tomorrow*, 7 Labor L.J. 476 (August 1956); Note, *Proper Subjects for Collective Bargaining: Ad Hoc* v. *Predictive Definition*, 58 Yale L.J. 803 (1959).

ceasingly regarded as critical elements of employee remuneration. The exclusion of veterans from benefits which have come to be regarded as essential perquisites of employment is plainly inconsistent with the statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed on the authority of *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225.

Respectfully submitted.

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Attorneys.

SEPTEMBER 1967.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 19777

MAGMA COPPER COMPANY, SAN MANUEL DIVISION, A CORPORATION, APPELLANT

v.

STEPHEN R. EAGAR, RAY F. STEPHENS, JAMES V. MORK, AND LEVI D. JARAMILLO, APPELLEES

(January 31, 1966)

Appeal from the United States District Court for the District of Arizona

Before: CHAMBERS, *Chief Circuit Judge;* MADDEN, *Judge of the Court of Claims,* and KOELSCH, *Circuit Judge.*

KOELSCH, *Circuit Judge:* Invoking Section 9 of the Universal Military Training and Service Act of 1948, 50 U.S.C. War Appendix, Section 459, plaintiffs brought this suit against the Magma Copper Company to recover holiday and vacation pay which they assert is due them.

Magma's employees were entitled to such pay under a series of contracts entered into between Magma and International Union of Mine, Mill & Smelter Workers, which represented the employees. The following provisions are pertinent to this case:

> "*9–8 Vacations.* B. Requirements to qualify. An employee who has been continuously employed by the Company for at least one (1) year immediately preceding the date of his

application for vacation and who has not had a vacation within said year and who has worked at least 75% of his available shifts within said year and who is an employee of the company on the day his vacation commences shall be entitled to a vacation with pay as hereinafter set forth.

* * * * *

E. * * * (7) Any employee leaving the service of the Company for any reason (except lay off due to reduction of work force) before his annual determinative date shall not be entitled to a vacation or vacation pay in lieu thereof * * *"

"*12-2 Holiday Pay.* A. Employees covered by this Agreement shall be paid the straight time rate, exclusive of shift differential, for the named holidays when not worked, subject to the following terms and conditions:

* * * * *

ii. An employee must have been on the Company's payroll continuously for three (3) months prior to the holiday in question."[1]

Plaintiffs were all employees of Magma immediately before entering into the armed services of the United States. Following their satisfactory completion of service they were restored to proper positions by Magma. The several claims they asserted were virtually the same; the facts were all stipulated and the issues purely legal ones. Those relating to the claim of Stephen R. Eagar are fairly representative. Eagar was continuously employed by Magma from March 12, 1958 until March 6, 1959, when he entered into military service. By the latter date he had already worked in excess of 75% of the shifts available in his vacation earning year (i.e., March 12, 1958 to March 12, 1959).

[1]The quoted provisions taken from the 1962 Labor Agreement are common to the various labor agreements in effect throughout the periods under consideration.

Following his return on May 2, 1962 he worked the last scheduled shift prior to and the first scheduled shift after the Memorial Day and Independence Day holidays. Magma refused his demand for vacation pay for the year commencing March 12, 1958 and for holiday pay for the two mentioned holidays. The grounds for refusal were that (a) as to vacation pay, he was not in the service of the Company at the end of his vacation earning year as required by the contract and (b) as to holiday pay, that he had not been on the Company payroll for the required period prior to either holiday.

The district court, however, rejected Magma's contentions and entered judgment for the plaintiffs. Magma has appealed.

The proposition is well established that present Section 9(b) B(i) of the Act [50 U.S.C. App. 459(b) B(i)] which requires the employer to restore a returning veteran to a position of like "seniority status and pay," means that "[h]e (the veteran) shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his country, with all of the insurance and other benefits accuring to employees on furlough or leave of absence. Section 8(c). Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold* v. *Sullivan Drydock & Repair*, 328 U.S. 275, 284-285 (1946).

In every instance where the issue has been presented, the courts have consistently held that the statute treats of two types of benefits: (a) "seniority, status and pay" and (b) "insurance and other benefits"; that "seniority" includes rights which auto-

matically accrue as a direct incident of length of job tenure—"a perquisite of seniority" [*Siaskiewicz* v. *General Electric Co.*, 166 F.2d 463, 466 (2d Cir. 1948)]; that "other benefits" cover "a fairly narrow group of economic advantages whose common quality [is] that they [are] miscellaneous 'fringe benefits' not usually regarded as part of 'pay,' 'status,' or 'seniority'" [*Borges* v. *Art Steel Co.*, 246 F.2d 735 (2d Cir. 1957)]; and that although "seniority" rights cannot lawfully be denied or diminished, the enjoyment of "other benefits" is governed by established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person (i.e., the veteran) was inducted. *Siaskiewicz* v. *General Electric Co., supra; Borges* v. *Art Steel Co., supra; Dougherty* v. *General Motors*, 176 F.2d 561 (3d Cir. 1949). See also *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (2d Cir. 1948). They have said, to quote from *Borges*, that "Vacation pay is of this fringe character, and we have previously refused to let returning veterans collect it if non-veterans on leave of absence do not get it." Speaking of the *Siaskiewicz*, *Borges* and *Dougherty* cases, appellees label them "plainly inapplicable" and incorrectly decided. They argue that "were it not for the interruption for military service, each of the appellees would, by the mere passage of time have received the vacation and holiday benefits claimed." This, of course, is a completely erroneous assumption which ignores the language of the statutes and flies directly in the face of the express eligibility provisions of the labor agreements.[2]

[2] In 1948 Congress amended Section 9(c) by the addition of "Section 3" which reads:

> It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) (of this section) should be so restored in such manner as to

In sum, we are in accord with the following quotation from the *Siaskiewicz* case:

> Since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under the heading of "other benefits." Hence under this language of the Act, appell[ees] must be treated like non-veteran employees on furlough or leave of absence. But non-veteran employees of [Magma] who were on leave of absence * * * would not be entitled to vacation pay for that year. Therefore, appell[ees] are not so entitled. To grant them such pay would be to discriminate in favor of them as veterans, and against non-veteran employees.

This same rationale dictates the same conclusion with respect to the claims for holiday pay.

The judgment of the district court is reversed and the action is dismissed. No costs are allowed.

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give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

It would appear that the amendment did no more than reflect Congressional approval of the Supreme Court's prior decisions construing the statutory language relating to the returned veteran's rights to seniority, status, and pay. *Tilson* v. *Missouri R.R. Co.*, 376 U.S. 169 (1964). None of those decisions dealt with fringe benefits.

United States Court of Appeals for the Ninth Circuit

No. 19777

MAGMA COPPER COMPANY, SAN MANUEL DIVISION, A CORPORATION, APPELLANT

v.

STEPHEN R. EAGAR, RAY F. STEPHENS, JAMES V. MORK, AND LEVI D. JARAMILLO, APPELLEES

(May 31, 1967)

Order on Petition for Rehearing

Before: CHAMBERS, *Circuit Judge,* MADDEN, *Judge of Court of Claims, and* KOELSCH, *Circuit Judge.*

PER CURIAM.

In a petition for rehearing, appellees contend that our decision is contrary to the law as announced in *Accardi* v. *Pennsylvania R.R. Co.,* 383 U.S. 225 (1966). We perceive no conflict.

What the Court said in Accardi regarding the policy of the Act was in the context of claims under Sec. 9(b)(B); the so-called "seniority" provision. It is of course well settled that a veteran's seniority is not impaired by reason of his military service, but to the contrary "automatically accrues" despite such service. Accordingly, he is "treated as though he had been continuously employed during the period spent in the armed forces." *Accardi,* p. 228. The Court did not have before it a "fringe benefit" type of claim such as those involved in this case and neither said nor intimated that such claims should be classified as Sec. 9(b) type claims or treated like them.

The petition for rehearing is denied.

MADDEN, Judge, dissenting:

I would grant the appellees' petition for rehearing. This Court's decision was announced on January 31, 1966. On February 28, 1966, the Supreme Court of the United States decided the case of *Accardi et al.* v. *Pennsylvania Railroad Co.*, 383 U.S. 225. In that case the Court of Appeals had decided that the severance pay there involved did not concern "seniority, status, and pay" within the meaning of §§ 8(b)(B) and (c) of the Selective Training and Service Act of 1940; that it was a "fringe benefit" and subject to whatever contractual provisions the employer had made with the union which was the bargaining agent for the employees. The Supreme Court said, in *Accardi*, pp. 229–230:

> As we said in *Fishgold* v. *Sullivan Corp.*, *supra*, "[N]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." At 825. The term seniority is not to be limited by a narrow technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country. In this case there can be no doubt that the amounts of the severance payments were based primarily on the employees' length of service with the railroad.

In our instant case, two of the employees had worked for almost a year, one lacking only seven days of the year necessary, under the union contract, to earn a paid vacation. Their work was interrupted, thus short of the necessary year, by their entrance into military service. The Supreme Court's language in

Accardi, quoted above, fits their situations exactly. The rights and benefits (paid vacations) which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country are the rights and benefits here at issue.

Three of the employees here involved worked both before and after several holidays. But their work after the holidays was not sufficiently soon after the holidays to entitle them, under the contract, to pay for the holidays. The reason why they were not at work immediately after the holidays was that they were then in the military service. The Supreme Court's language in *Accardi* applies to their situation.

I gather from the Supreme Court's opinion in *Accardi* that the distinction which the Court of Appeals made in *Accardi*, and which this court makes in the instant case, between "seniority, status and pay" on the one hand and "fringe benefits" on the other does not seem very vital to the Supreme Court. The issue seems rather to be whether the rights and benefits claimed by the employees "would have automatically accrued to them had they remained in their civilian jobs" instead of entering the military service.

I think our decision is contrary to *Accardi* and that we should grant the petition for rehearing.

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No. 659

In the Supreme Court of the United States

OCTOBER TERM, 1967

STEPHEN R. EAGAR, ET AL., *Petitioners*

vs.

MAGMA COPPER COMPANY

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INDEX

	Page
Question Presented	1
Statement	2
Reasons for Denying Writ	3
Conclusion	9

TABLE OF AUTHORITIES CITED

Cases	Pages
Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966)	3, 5, 7, 9
Alvado v. General Motors Corp., 2 Cir. (1955) 229 F.2d 408 (Cert. den. 351 U.S. 903)	8
Borges v. Art Steel Co., 2 Cir. (1957) 246 F.2d 735	8
Brown v. Watt Car & Wheel Co., 6 Cir. (1950) 182 F.2d 570 (Cert. den. 340 U.S. 875, 95 L.Ed 636, 71 S.Ct. 121)	8
Dougherty v. General Motors Corporation, 3 Cir. (1949) 176 F.2d 561 (Cert. den. 338 U.S. 956, 95 L.Ed 590, 70 S.Ct. 494)	8
Dwyer v. Crosby Co., 2 Cir. (1948) 167 F.2d 567	6
MacLaughlin v. Union Switch & Signal Co., 3 Cir. (1948) 166 F.2d 46	7, 8
Mentzel v. Diamond, 3 Cir. (1948) 167 F.2d 299	7, 9
Siaskiewicz v. General Electric Co., 2 Cir. (1948) 166 F.2d 463	5

Statutes	
Universal Military Training and Service Act, as amended, 62 Stat. 614, as amended, 50 U.S.C., App. 459, Section 9(c)	6

No. 659

In the Supreme Court of the United States

OCTOBER TERM, 1967

STEPHEN R. EAGAR, ET AL., *Petitioners*

vs.

MAGMA COPPER COMPANY

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

QUESTION PRESENTED

Non-veteran employees of respondent are not permitted, either by the Collective Bargaining Agreement or respondent's practice, to receive credit for time on furlough in determining their eligibility for either vacation or holiday benefits.

The question presented is whether Section 9 of the Selective Training and Service Act of 1940 permits veterans to receive credit for military service in determining their eligibility for vacation or holiday benefits even though non-veterans on furlough cannot receive such credit.

STATEMENT

Petitioners were employed by respondent, Magma Copper Company, in positions other than temporary. While still in respondent's employ, each of the petitioners left the service of respondent as furloughees to enter the Armed Forces of the United States. After receiving a certificate evidencing his satisfactory completion of his period of training and service, each petitioner returned to his former position with respondent.

At all times involved, Collective Bargaining Agreements between respondent and petitioners' bargaining representative governed the conditions of employment. Under the labor agreements, in order to be eligible for vacation pay (1) an employee must have worked at least 75% of his available shifts within his vacation year, and (2) must have been in the service of the Company on his anniversary date. With respect to holiday pay, the agreements provided that in order to be eligible (1) an employee must have worked his last scheduled shift prior to the holiday and his first scheduled shift after the holiday (unless he had an acceptable excuse) and (2) the employee must have been on the Company's payroll continuously for three months prior to the holiday in question.[1]

As petitioners have indicated, Eagar's case is fairly representative of the other claimants. He was employed on March 12, 1958 and entered the Armed Forces on March 6, 1959. Prior to his leaving the service of respondent, he had worked more than 75% of the shifts available in his vacation year; however, he left the service of the Company before his anniversary date of hiring. In accordance with the Collective Bargaining Agreement, he was not given vacation pay. Eagar returned to the service of respondent

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1. Pertinent provisions of Agreement are in Pet. for Cert., App. pp. 13-14.

on May 2, 1962 and worked his last scheduled shifts prior to and his first scheduled shifts after the 1962 Memorial Day and Independence Day holidays. However, he was not continuously on the payroll of respondent for three months prior to the holidays in question. In accordance with the Collective Bargaining Agreement, he did not receive holiday pay for those holidays.

Petitioners brought suit in the District Court to recover vacation pay and holiday pay, contending that the Universal Military Training and Service Act entitled them to be treated as having been continuously at work with respect to eligibility to holiday and vacation pay.

The United States District Court for the District of Arizona granted judgment for petitioners on their motion for summary judgment. The United States Court of Appeals for the Ninth Circuit reversed the District Court's decision. (380 F.2d 318, quoted in the Pet. for Cert., App. pp. 13-17) Petitioners sought rehearing and the Court of Appeals for the Ninth Circuit denied the petition. (Quoted in Pet. for Cert., App. pp. 18-20)

REASONS FOR DENYING WRIT

There is no conflict between the Ninth Circuit's decision in this case and the decisions of this Court, or the decisions of any other court of appeals.

1. *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966)

Petitioners base their application for a writ principally on a contention that the decision below is directly contrary to this Court's decision in the *Accardi* case. However, there is no such conflict. The two cases are quite distinct.

The *Accardi* case involved the computation of severance benefits when certain jobs were abolished by the railroad company more than fifteen years after the veterans in-

volved returned from World War II. Respondent railroad company in that case deducted time spent in the Armed Forces in the computation of severance pay. This Court found that the real nature of such severance payments was compensation for loss of jobs. The amounts of the severance payments were based primarily on seniority so that under the Act time spent in the Armed Forces should have been included. The Court found that these severances were just as much a prerequisite of seniority as the order of layoff and recall.

Our case does not involve computation of severance or pension benefits based on seniority. It concerns the eligibility for vacation and holiday pay. These benefits are earned by service for the Company similar to wages and are in no sense compensation for loss of jobs such as severance or pension benefits.

The contract here expressly provides that the amount of vacations is determined by seniority but that *eligibility* for vacations and holidays is determined by payroll status. Petitioners had left the payroll of the Company so did not have such status.

In the instant case, the veterans were given full seniority credit for time spent in the Armed Forces in determining the amount of subsequent vacations. The Collective Bargaining Agreement specifically states that furloughees to the Armed Forces will, upon return to work, be allowed credit for time spent in the Armed Forces as time worked in determining the vacation amounts. Thus, Eagar, who was employed in 1958 and was in the Armed Forces from 1959 to 1962, was upon his return considered a four-year employee rather than a one-year employee in future vacation computations as though he had never left the employment of respondent. This point was never in dispute in the case

at hand. Therefore, we cannot agree with petitioners' contention that our case is directly contrary to *Accardi*. The Company's practice was absolutely consistent with the ruling in the *Accardi* case.

In our case, petitioners are claiming credit for time spent in the Armed Forces in determining eligibility for vacations and holidays just as though they had been at work. This contention has been answered without conflict by various courts of appeals.

Our case is quite similar to *Siaskiewicz v. General Electric Co.*, 2 Cir. (1948) 166 F.2d 463. In that case, as here, the labor agreement expressly provided that length of vacation was determined by seniority but that eligibility for vacations was determined by payroll status. Petitioners did not have such status. The argument advanced in that case, as here, was not that the veterans were deprived of seniority. Instead, they reasoned that but for their service in the Armed Forces the veterans would have been at work for respondent and had they been at work they would have had payroll status and would have been entitled to vacation pay. They claimed that for purposes of vacation pay the veterans should be treated as if they had been at work for respondent during the period they were in the Armed Forces.

The Second Circuit, in *Siaskiewicz*, said:

> "* * * Since vacation rights are not pay unless they are for work actually done, and since they are not merely a prerequisite of seniority, they must fall under the heading of 'other benefits.' Hence, under the language of the Act, appellants must be treated like non-veteran employees on furlough or leave of absence. But non-veteran employees of appellee who were on leave of absence * * * would not be entitled to vacation pay for that year. Therefore, appellants are not so entitled. To grant them such pay would be to discriminate in

favor of them as veterans, and against non-veteran employees. That discrimination in favor of veterans is as foreign to the purposes of the Act as discrimination against them, the Supreme Court decided when it passed on the issue of 'super-seniority'." (166 F.2d at Pages 465-466)

Judge Learned Hand stated in *Dwyer v. Crosby Co.*, 2 Cir. (1948) 167 F.2d 567:

"• • • Although it was unlawful to attempt by contract to provide that a veteran should be deemed not to be 'in the employ' of the company while he was serving in the Army, it was not unlawful to deny him vacation, unless it was an 'established rule of the company' to give vacation to those who were on 'leave of absence'."

"• • • *obviously the considerations which might make it proper that service in the Army should not affect a man's seniority are utterly different from those which should count in computing vacations.*" (Emphasis added) (167 F.2d at Pages 569-570)

Section 9(c)(1) of the Act provides:

"(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) (of this section) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, *shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence.*" (Emphasis added)[2]

Under the Collective Bargaining Agreements and established practice of respondent, non-veteran employees on

2. Universal Military Training and Service Act, as amended, 62 Stat. 614, as amended, 50 U.S.C., App. 459.

furlough are not permitted to count time off the payroll in determining eligibility for vacations or holidays. The veteran furloughees were treated the same as the non-veteran furloughees and are not entitled to more under the Act.

Many labor agreements do not require a minimum number of shifts in determining eligibility but still require continuity of payroll status in order to qualify for vacations or holidays. Under such agreements, petitioners' argument would mean that veteran furloughees should be entitled to all vacations, holidays and other fringe benefits, which they would have received but for their entering the Armed Forces, even though non-veteran furloughees would not be eligible for such benefits. Such bizarre results are not required under the Act.

Petitioners also assert that the decision below is in direct conflict with the decisions of the Third Circuit in *Mentzel v. Diamond*, 3 Cir. (1948) 167 F.2d 299, and *MacLaughlin v. Union Switch & Signal Co.*, 3 Cir. (1948) 166 F.2d 46. There is no such conflict and those two cases are quite distinguishable.

The *Mentzel* case deals with the amount of vacations to be granted veterans subsequent to their return. The Company in the *Mentzel* case did not credit time spent in the Armed Forces in computing the amount of vacations after the veterans returned. The basis for that suit was similar to the dispute regarding computation of severance allowance in the *Accardi* case. But, as we have already noted, there is no dispute in our case regarding this point. Under our union contract and consistent practice, the veterans, upon their return, were granted full credit for time spent in the Armed Forces in computing the amount of future vacation allowances.

The *MacLaughlin* case involves a unique contractual provision under which employees actually earned vacations as they worked during the year. It appears from that contract that furloughees would receive vacation pay and the Court ruled that veteran furloughees should be placed in the same status as the non-veteran employees as to vacation rights.

> "It would require a strained interpretation of the statute not to place veterans in pari passu with non-veteran employees as to vacation rights, if such rights are due the veteran under the contract.
>
> "• • • we are adjudicating only the question of vacation rights granted under specific contracts." (166 F.2d 46 at Page 49)

The Third Circuit, a year later, in *Dougherty v. General Motors Corporation,* 3 Cir. (1949) 176 F.2d 561 (Cert. den. 338 U.S. 956, 94 L.Ed 590, 70 S.Ct. 494), pointed out the distinction in the *MacLaughlin* case and consistent with the ruling in the case at hand stated:

> "However desirable and feasible some modification of the provision by the parties themselves might have been, we cannot impose as a legal requirement a vacation provision other than that on which the bargainers agreed, as long as the intent and operation do not place veterans in a position inferior to that of non-veterans on leave of absence."

We know of no courts of appeals' decisions contrary to the decision in our case. See similar reasoning in: *Alvado v. General Motors Corp.,* 2 Cir. (1955) 229 F.2d 408 (Cert. den. 351 U.S. 903); *Brown v. Watt Car & Wheel Co.,* 6 Cir. (1950) 182 F.2d 570 (Cert. den. 340 U.S. 875, 95 L.Ed. 636, 71 S.Ct. 121); *Borges v. Art Steel Co.,* 2 Cir. (1957) 246 F.2d 735.

2. The decision below will not cause any widespread problems in the application of the re-employment provision of the Universal Military Training and Service Act. Other courts of appeals over the past twenty years have given rulings similar to this one without creating any apparent problems. Petitioners have noted that they are informed by the Labor Department that there are a number of vacation and holiday pay claims since the Ninth Circuit decision in this case. We see no significance in the number of cases which the Veterans Administration and Labor Department may have accumulated and suspect that those cases are not similar to our case, but are actually like the *Mentzel* and *Accardi* cases which involve a distinct principle which is not in dispute in this case.

CONCLUSION

For the foregoing reasons, we respectfully request that the Writ of Certiorari be denied.

Respectfully submitted,

HOWARD A. TWITTY
Attorney for Respondent

RALPH B. SIEVWRIGHT
Of Counsel

October, 1967

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No. 659

In the Supreme Court of the United States

OCTOBER TERM, 1967

STEPHEN R. EAGAR, ET AL., *Petitioners*

vs.

MAGMA COPPER COMPANY

Petition of Respondent for Rehearing

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No. 659

In the Supreme Court of the United States

OCTOBER TERM, 1967

STEPHEN R. EAGAR, ET AL., *Petitioners*

vs.

MAGMA COPPER COMPANY

Petition of Respondent for Rehearing

By the decision of December 11, 1967, this Court reversed the judgment of the United States Court of Appeals for the Ninth Circuit in the captioned case. Respondent, pursuant to Rule 58 of the Rules of this Court, respectfully petitions the Court for rehearing.

Petitioners filed a Petition for a Writ of Certiorari in this case, and Respondent filed a Brief in Opposition. The Court, divided five to three, granted the Petition for a Writ of Certiorari and at the same time summarily reversed the judgment of the Court below without receiving additional briefs from either party.

Respondent does not contend that this matter was inadequately presented to the Court on the briefs filed in connection with the Petition for Writ of Certiorari. Little could be added on the merits by additional briefs or oral argu-

ment. However, because the Court was so closely divided on the question presented and because of the serious implication left by this decision that the "other benefits" section of the Act[1] is of no significance, we respectfully request that this Court reconsider its decision.

The majority of this Court ruled, without giving an opinion, that the case was controlled by *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225. However, the *Accardi* case involved pension benefits which were based on *seniority*. This Court noted in *Accardi*—

> "In this case there can be no doubt that the amounts of the severance payments were based primarily on the employees' length of service with the railroad." . . . "We think it clear that the amount of these allowances is just as much a prerequisite of seniority as the more traditional benefits such as work preference and order of layoff and recall." (383 U.S. 225 at p. 230)

Thus, severance payments, which were in question in the *Accardi* case, were ruled to be based on seniority, which are governed under the provisions of the Act providing for reinstatement "without loss of seniority". After ruling that the benefits in question in *Accardi* were really seniority benefits, the Court found it unnecessary to discuss the clause in Section 9(c) of the Act relating to "insurance or other benefits".

> "What we have said makes it unnecessary to discuss in detail the Court of Appeals' holding that these allowances did not come within the concepts of 'seniority, status, and pay' and thus were governed not by § 8(b) (B) and the part of § 8(c) relating to seniority but rather by the clause in § 8(c) stating that returning veterans 'shall be entitled to participate in insurance or

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1. Universal Military Training and Service Act, 62 Stat. 615, as amended, 50 U.S.C. App. § 459.

other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces . . .' " (383 U.S. 225 at p. 231)

In contrast, however, the case at hand in no way concerns seniority, but deals with eligibility for vacation and holiday pay. In the *Accardi* case, the veterans did not receive credit for time spent in the Armed Forces in computing subsequent severance allowance. Our case does not concern this problem. The veterans here were given full credit for the length of time spent in the Armed Forces in determining the amount of subsequent vacations. Respondent Magma, therefore, complied in all respects with the "seniority" provision of the Act.

Vacation and holiday benefits are typical fringe benefits in labor agreements. It would seem that if Section 9(c), relating to "insurance or other benefits", has any application it would be in determining eligibility for these fringe benefits.

In *Accardi*, the Court noted:

> "The Government contends that the 'other benefits' clause of § 8(c) was added to the bill 'for the express purpose of entitling employees to receive, while in service, such benefits as their employers accorded employees on leave of absence.' The legislative history referred to in the Government's brief persuasively supports such a purpose." (383 U.S. 225 at p. 231)

Respondent complied with the "other benefits" clause. In determining their eligibility for vacations and holidays, petitioners were treated the same as all other employees on furlough whether for military or nonmilitary reasons. The Act does not require that they be given preferential treatment.

Because the majority of the Court ruled that this case is controlled by the *Accardi* decision, we are fearful that the Department of Labor and Veterans' Administration in administering the Universal Military Training and Service Act will now contend that the "other benefits" clause of the Act is meaningless even though Section 9(c) speaks of both "seniority" and "insurance or other benefits". Under such an interpretation, the next step could well be that returning veterans will claim all vacations, holidays, paid sick leave, group, hospital, medical and life insurance and any other fringe benefits which they would have received during their absence to the Armed Forces regardless of whether other furloughees are eligible for these benefits. Surely the Court did not intend this.

Therefore, we respectfully request that this Court reconsider its decision in this case and affirm the judgment of the Court below.

HOWARD A. TWITTY
Attorney for Respondent

RALPH B. SIEVWRIGHT
Of Counsel
December 22, 1967

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is, in my judgment, well founded and is presented in good faith and not for the purposes of delay.

HOWARD A. TWITTY

PER CURIAM

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

EAGAR ET AL. *v.* MAGMA COPPER CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 659. Decided December 11, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Accardi* v. *Pennsylvania Railroad Co.*, 383 U. S. 225.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur, dissenting.

Petitioner Eagar [1] began working for Magma Copper Company March 12, 1958, and left to enter military service just shy of one year later, March 6, 1959. After being honorably discharged, Eagar promptly resumed his employment with Magma, May 2, 1962. He seeks vacation pay for the work year following March 12, 1958, and for the Memorial Day and Independence Day holidays in 1962, which followed his re-employment.

Under Magma's collective bargaining agreement with petitioners' union, paid vacations are provided at the end of a work year if the employee works 75% of the shifts available to him in that year and is employed with Magma on the one-year anniversary date. Employees who get paid holidays must have worked the shift before and the shift after the holiday and have been on Magma's payroll continuously for three months before the holiday.

[1] There are three other employees of respondent Magma Copper in addition to Eagar on whose behalf the Department of Justice has sought review. The Solicitor General and respondent agree that the facts in Eagar's case are representative of the other petitioners, and this Court is asked to resolve the legal dispute on the basis of these facts.

Although Eagar had worked 75% of the shifts for the year March 12, 1958, to March 12, 1959, and had worked the shifts before and after Memorial Day and Independence Day in 1962, Magma denied him benefits. Eagar was not, Magma claims, in its employ on March 12, 1959, nor had he been on the payroll three straight months prior to Memorial and Independence days in 1962.

The majority hold that Magma has violated § 9 (c) of the Universal Military Training and Service Act, 62 Stat. 615, as amended, 50 U. S. C. App. § 459, which provides, *inter alia*, that a returning serviceman such as Eagar who is re-employed "shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, [and] shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees *on furlough or leave of absence* in effect with the employer at the time such person was inducted into such forces . . . ."[2] (Italics added.)

Section 9 (c) speaks both of "seniority" and of "insurance or other benefits." In dealing with seniority problems under a like statutory provision, we held that the employee is to be treated as if he had kept his position continuously during his stint in the Army. *Accardi* v. *Pennsylvania R. Co.*, 383 U. S. 225, 228; *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 284–285.

But this case does not concern "seniority." No employee of Magma, it appears, regardless of how long he has been with the firm, gets paid vacation if he is not on the payroll at his work-year anniversary date. No

[2] Section 9 (c) also provides:

"It is declared to be the sense of the Congress that any person who is restored to a position in accordance with . . . this section should be so restored in such manner so as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

employee gets a paid holiday unless he has been with Magma for the three preceding months. The *length* of vacation and the *amount* of vacation and holiday pay Magma gives do turn on seniority. But petitioners do not contest Magma's assertion that it does figure the length of vacation for returning servicemen as though they had been constantly on the payroll during their tour of duty in the military. In considering the employee's eligibility for vacation and holiday pay, since seniority is not involved, the courts must apply the "other benefits" clause of § 9 (c). See *Borges* v. *Art Steel Co.*, 246 F. 2d 735, 738 (C. A. 2d Cir.). As noted, these benefits are accorded as if the employee were on "furlough or leave of absence" while in service. That is precisely what Magma has done.

Accardi admonishes the courts to give the term "seniority" a broad interpretation. 383 U. S., at 229. But *Accardi* did not involve the "other benefits" clause, which must be applicable in this clear fringe-benefits case if at all.[3] As Judge Learned Hand said, "[O]bviously the considerations which might make it proper that service in the Army should not affect a man's seniority are utterly different from those which should count in computing vacations." *Dwyer* v. *Crosby*, 167 F. 2d 567, 570 (C. A. 2d Cir.). I would affirm the judgment below.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[3] The "sense of Congress" proviso in § 9 (c) does not indicate a different result. The language was added in 1948 when the "seniority" and "other benefits" provisions were re-enacted upon the expiration of § 8 of the Selective Training and Service Act of 1940. The "sense of Congress" is concerned with employee "status," see n. 2, *supra*. But if "status" were meant to include eligibility for fringe benefits, Congress would not have left unchanged the explicit provision that "other benefits" are to be dispensed as if the returning serviceman had been on leave of absence.